

INTERNATIONAL MEASURES FOR THE PROTECTION OF CIVILIANS IN LIBYA AND THE CÔTE D'IVOIRE

I. INTRODUCTION

The interpretation of United Nations Security Council (UNSC) resolutions adopted under Chapter VII of the UN Charter has been the elephant in the room, or more accurately the chamber of the Council, since the bitter divisions over the 'revival argument' and the invasion of Iraq in 2003.¹ Although there has been some evidence of an increase in the specificity of UNSC resolutions in an effort to avoid the same difficulties reoccurring,² the margin of appreciation provided to states in interpreting the mandates provided to them has recently come into focus again.

The recent wave of democratic uprisings across the Middle East and North Africa, otherwise known as the 'Arab spring', has been as swift as it has been symbolic. However, it was the uprising in Libya, and the violent suppression of it by the Gaddafi regime, that most seemed to catch the attention of western leaders, the media and, perhaps most notably, the UNSC. Indeed, on 17 March 2011, in what was a remarkable development, the UNSC adopted UNSCR 1973 (2011) in which it not only established a no-fly zone over Libya, and provided authorisation to member states to take 'all necessary measures' to enforce compliance with it,³ but also authorised the use of 'all necessary measures ... to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory'.⁴

Just a few weeks later a similar measure was authorised, or more accurately recalled, by the UNSC regarding the situation in Côte d'Ivoire following the disputed election result and the troubles that ensued in the country after Laurent Gbagbo refused to cede power to Alassane Ouattara, the widely recognised winner of the election.⁵ In UNSCR 1975 (2011), adopted on 30 March 2011, the UNSC, after urging Gbagbo to hand power to Ouattara in accordance with the election result,⁶

Recall[ed] its authorization and stresse[d] its full support given to the UNOCI, while impartially implementing its mandate, to use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence,

¹ For more on this see M. Weller, *Iraq and the Use of Force in International Law* (Oxford: Oxford University Press, 2010), 132-188; C. Henderson, *The Persistent Advocate and the Use of Force: The Impact of the United States upon the Jus ad Bellum in the Post-Cold War Era* (Farnham: Ashgate, 2010), 63-95.

² In connection with North Korea, the UNSC specifically stated to be acting under Article 41 of the UN Charter in UNSCR 1718 (2006), preamble, whilst in connection with Iran the UNSC specifically stated to be acting under Article 40 of the UN Charter in UNSCR 1696 (2006), preamble.

³ UNSCR 1973 (2011), paras 6-12. France, the UK, Lebanon, the US, South Africa, Bosnia-Herzegovina, Colombia, Portugal, Nigeria and Gabon all voted in favour, while China, Russia, Brazil, India and Germany abstained.

⁴ *Ibid.*, para. 4. The resolution also reaffirmed and extended various measures adopted in UNSCR 1970 (2011), such as the arms embargo (paras 13-16) and the asset freezes (paras 19-21).

⁵ UNSCR 1975 (2011), para. 6.

⁶ *Ibid.*, paras 1-4

within its capabilities and its areas of deployment, including to prevent the use of heavy weapons against the civilian population.⁷

The general responsibility for the protection of civilians in a particular state is one that has been laid squarely at the feet of its individual leaders. Yet, if the leaders are unable or unwilling to live up to this responsibility then it is one now borne by the broader international community. Indeed, the notion of a ‘responsibility to protect’ is one that has gathered momentum in the past decade,⁸ even if it is yet to be clearly seen in practice.⁹ In both resolutions concerning Libya and Côte d’Ivoire this doctrine was mentioned and was done so after it was clear that such protection would not be forthcoming from the regimes in power.¹⁰ Consequently, the *raison d’être* of the authorisations to use ‘all necessary measures/means’ was the protection of civilians in these states.

There are many legal issues that arise from these particular interventions. For example, whilst such an authorisation from the UNSC provides a *pre facto* determination that force is necessary,¹¹ questions remain over whether the actions taken in both states, but perhaps especially in Libya, have been proportional to the aim of the protection of civilians.¹² However, the aim of this short article is to provide some brief comments on two of the main controversies regarding the possible types and extent of the measures authorised under the mandates. In particular, it considers whether these measures permit the arming of opposition groups, which has been a particular issue in Libya, and a forcible regime change.

II. ASSISTANCE TO OPPOSITION GROUPS

In Libya, a comprehensive arms embargo precluding the transfer of arms into the whole of the territory was imposed by paragraph 9 of UNSCR 1970 (2011). Indeed, the UNSC

⁷ Ibid., para. 6. The authorisation was recalled from that which was originally granted to the UN Operation in Côte d’Ivoire (UNOCI) and the French forces operating within the country in UNSCR 1528 (2004), paras 6 and 16 respectively.

⁸ The notion made its first appearance in *The Report of the International Commission on Intervention and State Sovereignty: The Responsibility to Protect*, December 2001, available at <http://www.iciss.ca/report-en.asp>, but was subsequently accepted by states in the 2005 UN World Summit Outcome document, UNGAR A/60/L.1, 15 September 2005.

⁹ Darfur is an example, if one were needed, of a failure to fully implement this notion.

¹⁰ See UNSCR 1973 (2011), preamble, and UNSCR 1975 (2011), preamble, respectively.

¹¹ The UK Attorney-General, Dominic Grieve, advised the UK Cabinet that UN resolutions provided a ‘clear and unequivocal’ legal basis for deployment of UK forces and military assets. The full advice was not published on the basis that that was consistent with past practice. See P. Wintour and O. Bowcott, ‘Libya: The Legal Case for Deployment’, *The Guardian*, 21 March 2011, available at <http://www.guardian.co.uk/world/2011/mar/21/libya-arab-and-middle-east-protests>. On 21 March 2011 the UK’s participation in the forcible measures in Libya under UNSCR was overwhelmingly supported by the UK Parliament which voted by 557 to 13 in favor. See <http://www.parliament.uk/business/news/2011/march/debate-on-military-action-in-libya/>.

¹² This issue is particularly pertinent in light of the increasing intensity of the strikes in Libya. See BBC News, ‘Cameron and Obama “Turn Up Heat on Libya”’, 25 May 2011, available at <http://www.bbc.co.uk/news/uk-13548050>. On the notions of necessity and proportionality in international law governing the use of force see, in general, J. Gardam, *Necessity, Proportionality and the Use of Force by States* (Cambridge: Cambridge University Press, 2004).

Decide[d] that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, from or through their territories or by their nationals, or using their flag vessels or aircraft, of arms and related materiel of all types.¹³

UNSC arms embargoes are usually interpreted to provide comprehensive territorial embargoes unless, of course, the resolution expressly limits its application to particular groups.¹⁴ Such a limitation was not included here and, as such, any provision of weapons to the opposition forces was precluded by this particular operational paragraph.¹⁵ However, UNSCR 1973 (2011) ‘*Authorize[d]* Member States ... to take all necessary measures, *notwithstanding paragraph 9 of resolution 1970 (2011)*, to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya’.¹⁶ Subsequently, a debate emerged between state leaders and, perhaps unsurprisingly, amongst international lawyers as to the impact of this authorisation upon the arms embargo. It was clear that the embargo did not prevent those states authorised to implement the mandate from supplying their own troops with arms whilst operating in the territory of Libya.¹⁷ However, there was some debate as to how absolute the arms embargo remained in regards to the supply of weapons to others and, in particular, to the opposition forces.

Upon a textual interpretation of this paragraph it appears to provide some seepage to what appeared a watertight arms embargo. Indeed, an authorisation by the UNSC to use ‘all necessary measures/means’ is now a well-accepted euphemism in the practice of the Council for permission to use force to achieve a specified goal.¹⁸ Force, as set out by the International Court of Justice in the *Nicaragua* case, can be used directly, in the form of states using force through their own armed forces, or indirectly, in the form of the supply of support to non-state forces.¹⁹ In this sense, the authorisation provided in UNSCR 1973 (2011) did not state a preference for either modality in carrying out the mandate. Yet, whilst there is nothing in principle preventing the UNSC from authorizing the arming of rebels in a civil war, this would of course be an extraordinary thing for a resolution of this organ to include.

Given the ambiguity over the mandate that a purely textual reading provides, it must be kept in mind that UNSCRs do not come into existence through some sort of ‘big bang’ but are drafted and agreed to by a collective group of actors within the UNSC whose collective views are key to interpreting the resolutions they have created.²⁰ At the UNSC

¹³ UNSCR 1970 (2011), para. 9.

¹⁴ See, for example, UNSCR 1807 (2008), para. 1 concerning the situation in the Democratic Republic of Congo.

¹⁵ The embargo was subsequently reaffirmed, and in some respects strengthened, in UNSCR 1973 (2011), paras 13-16.

¹⁶ UNSCR 1973 (2011), para. 4 (second emphasis added).

¹⁷ Indeed, an arms embargo was imposed on Iraq in UNSCR 661 (1990), para. 3(c) but this did not impact upon the coalition states’ ability to import weapons into the state for their own use under the authorisation to use ‘all necessary means’ to evict Iraq from Kuwait in UNSCR 678 (1990), para. 2.

¹⁸ See Henderson, *supra* n. 1, 42-51.

¹⁹ See *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America) (1986) ICJ Rep 14.

²⁰ The importance of discerning the views of the UNSC member states in interpreting resolutions of the UNSC was recently noted by the International Court of Justice in *Accordance with International Law of the*

meeting when the resolution was adopted no such option was discussed.²¹ Outside of the UNSC, the member states have adopted different positions over the issue, with some, such as the US and UK focusing on the text,²² whilst others, such as Russia and also the NATO Secretary-General, focusing on the overall aim of the resolution – the protection of civilians.²³ Given this state of affairs, it may be contended that the wording was adopted to create some form of ‘intentional ambiguity’ thereby allowing all states to win the argument over its permissible limits.²⁴ Indeed, the inclusion in the text of such ambiguities could mask any differences that existed between the states. However, given these differences any possibility of the UNSC either adopting a resolution or presidential statement clarifying the issue seems remote. In any case, it may be too late given the reports that the arming of the rebels has already taken place.²⁵

Nonetheless, what is clear is that the type of force in this context must be directed exclusively towards the protection of ‘civilians or civilian populated areas’. As such, any actions undertaken by the coalition with the aims of achieving other goals constitutes an action taken outside of the terms of the resolution. If such actions involved the provision of arms, then there would be specifically caught by the arms embargo. However, whilst short of an ‘occupation force’ - which was specifically precluded²⁶ - some of the coalition members decided to send military personnel to the eastern rebel stronghold of Benghazi to

Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion), 22 July 2010, para. 94, available at <http://www.icj-cij.org/docket/files/141/15987.pdf>. See also Henderson, supra n. 1, 22-25.

²¹ See UN Doc. S/PV.6498 (17 March 2011).

²² For example, US Secretary of State Clinton, in an unequivocal statement, asserted that ‘[i]t is our interpretation that [UN Security Council resolution] 1973 amended or overrode the absolute prohibition on arms to anyone in Libya’. See BBC News, ‘Libya: Obama Does Not Rule Out Arming Rebel Forces’, 30 March 2011, available at <http://www.bbc.co.uk/news/world-africa-12902450>. In this respect it is perhaps of some significance that the use of the word ‘notwithstanding’, or in other words ‘in spite of’, was an amendment of the US during the drafting of the resolution. See BBC News, ‘Libya: Coalition Divided on Arming Rebels’, 29 March 2011, available at <http://www.bbc.co.uk/news/world-africa-12900706>. The UK Prime Minister David Cameron took a similar position. See BBC News, ‘UK Takes Steps to Expel Five Libyan Diplomats’, 30 March 2011, available at <http://www.bbc.co.uk/news/uk-12908241>.

²³ Russia's Foreign Minister Sergei Lavrov stated that the international coalition did not have the right to arm the anti-Gaddafi opposition and condemned the intervention by the coalition in what is essentially a civil war as not being sanctioned by the UNSC. See BBC News, ‘Libya: Council Divided on Arming Rebels’, 29 March 2011, available at <http://www.bbc.co.uk/news/world-africa-12900706>. The NATO Secretary-General, Anders Fogh Rasmussen, was also clear when he said ‘[w]e are not in Libya to arm people. We are in Libya to protect civilians against attacks’. See Sky News, ‘Confusion Reigns Over Arming Libyan Rebels’, 31 March 2011, <http://news.sky.com/skynews/Home/World-News/Libya-Confusion-Reigns-Over-Whether-Libyan-Rebels-Should-Be-Given-Arms-By-Coalition/Article/201103415963069?f=rss>.

²⁴ For a discussion of this notion in connection with UNSCR 1441 (2002) and the ‘revival argument’ regarding the legality of the use of force against Iraq in 2003 see, generally, M. Byers, ‘Agreeing to Disagree: Security Council Resolution 1441 and Intentional Ambiguity’ (2004) 10 *Global Governance* 165.

²⁵ There were reports from Benghazi suggesting that rebel forces were already beginning to receive arms shipments by the 18 April 2011. See BBC News, ‘Libya: A New Phase in the Conflict?’, 18 April 2011, available at <http://www.bbc.co.uk/news/uk-13112559>. At the third meeting of the international Contact Group on Libya in Abu Dhabi on 9 June 2011, Western and Arab governments pledged more than £800 million in support to the Libyan opposition group, the Transitional National Council. See X. Rice, I. Black, and I. Traynor, ‘£800m Channelled to Libyan Rebels as Alliance Moves to Hasten Fall of Gaddafi’, *The Guardian*, 10 June 2011, 19. For more on the Contact Group see infra n. 55.

²⁶ UNSCR 1973 (2011), para. 4.

‘advise’ the rebels on logistics and intelligence training.²⁷ Almost in the same breadth as talking about the provision of ‘arms’ and ‘advice’ to the rebels the provision of ‘non-lethal military equipment’ - in the form of body armor and satellite telephones - was also raised.²⁸ In this respect, unless the use of force for the task of protecting civilians was in some way delegated to the opposition forces, it is hard to see how providing them with such assistance does anything other than assist them in winning the civil war and changing the political leadership of the country.²⁹ Whilst the opposition forces winning the civil war would in many respects be a laudable outcome, it simply does not equate to the protection of civilians.

But all of this misses the key issue of whether it is *wise* to provide the opposition forces with such assistance. Indeed, it was openly acknowledged that the coalition did not know who the rebel group operating in Libya were, with some suggestions of possible links to al-Qaida.³⁰ This being the case, the law of unintended consequences may have some significance as once the opposition groups are armed then the coalition forces may not have direct control over to what ends and for what purposes those arms are used. For example, arms which are originally and ostensibly intended as *defensive* weapons can easily be subsequently employed for *offensive* purposes. Of course, if the rebels were to use these weapons against civilians then the intervening states would have the authority under UNSCR 1973 (2011) to use force against them. If this was the case, then the coalition may consequently find that they are staring down the barrel of their own guns.

Ultimately, although not a long-term solution, a stalemate may well be the only outcome in which civilians are truly protected. If one accepts this view, then ‘it may be lawful to assist the rebels to defend the areas they hold but not to assist them to advance on other towns.’³¹ This is, of course unless one is to conclude that the goal of protecting civilians

²⁷ This was principally the UK, France and Italy. See BBC News, ‘MPs’ Concern Over Mission Creep Grow’, 20 April 2011, available at <http://www.bbc.co.uk/news/uk-politics-13142441> and BBC News, Libya: ‘France and Italy to Send Officers to Aid Rebels’, 20 April 2011, available at <http://www.bbc.co.uk/news/world-africa-13143988>. There were reports that CIA and British Special Forces had been in Libya long before this announcement. See BBC News, ‘Obama Authorises Covert Aid to Libyan Rebels- Reports’, 31 March 2011, available at <http://www.bbc.co.uk/news/world-us-canada-12915401>. The arms embargo in UNSCR 1970 (2011) also specifically precluded ‘technical assistance, training, financial or other assistance, related to military activities’. See UNSCR 1970 (2011), para. 9.

²⁸ UK Prime Minister David Cameron claimed that UNSCR 1973 (2011) permitted ‘assisting the rebels with non-lethal equipment’. See BBC News, ‘Cameron: Libya UN Resolution Makes Mission “Difficult”’, 17 April 2011, available at <http://www.bbc.co.uk/news/uk-politics-13107834>. US officials told the Associated Press that the Obama administration had decided to give the rebels \$25m in ‘non-lethal assistance’ after assessing their capabilities and intentions. See BBC News, ‘Libya: France and Italy to Send Officers to Aid Rebels’, 20 April 2011, available at <http://www.bbc.co.uk/news/world-africa-13143988>. Paragraph 9 of UNSCR 1973 (2011), in setting out the arms embargo, and in making a distinction between offensive and defensive equipment, decided that the embargo was not to apply to ‘non-lethal military equipment intended solely for humanitarian or protective use’. UNSCR 1970 (2011), para. 9(a).

²⁹ See Section III.B below.

³⁰ P. Swami, ‘Libyan Rebel Commander Admits His Fighters Have al-Qaida Links’, *The Telegraph*, 25 March 2011, available at <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8407047/Libyan-rebel-commander-admits-his-fighters-have-al-Qaeda-links.html>.

³¹ D. Akande, ‘Does SC Resolution 1973 Permit Coalition Military Support for the Libyan Rebels’, *EJIL Talk!*, 31 March 2011, available at <http://www.ejiltalk.org/does-sc-resolution-1973-permit-coalition-military-support-for-the-libyan-rebels/>.

can only ultimately be achieved through the removal of the regime at the helm of the state and the one perceived as being behind such attacks.

III. REGIME CHANGE

The Gaddafi regime was condemned in many ways in both UNSCR 1970 (2011) and UNSCR 1973 (2011) yet his removal from power in Libya was never stated to be an aim of the UNSC and certainly not through the forcible measures authorised in paragraph 4 of UNSCR 1973 (2011). By contrast, in UNSCR 1975 (2011) regime change *was* the overall stated aim of the UNSC through it expressly calling for Laurent Gbagbo to relinquish power in Côte d'Ivoire.³² However, the mandate to use force in this resolution was expressly stated to be implemented 'impartially' with the protection of civilians the only aim of the authorisations. As such, 'it seems that the resolution's opening paragraphs cannot justify a broad reading of the authorisation given the latter's strict wording.'³³ Nevertheless, although there was some confusion as to the real aims of the authorised forces acting under these mandates, it became clear over time that regime change was the ultimate goal in both states. The question is whether, and if so through what means, this result could be lawfully achieved.

A. Directly targeted

The first issue that arises is whether the two mandates provided for the direct targeting of Colonel Gaddafi and Laurent Gbagbo. Under the *jus ad bellum*, the necessity for the use of forcible measures in these two states was restricted to the overall aim of the 'protection of civilians'. However, in acting in pursuance of this mandate NATO, the UN forces and France are obligated to comply with the rules of the *jus in bello*.³⁴ As such, questions of specific targeting come within the domain of this particular branch of international law which requires that the targets chosen should be limited exclusively to those furthering the specific military objectives.³⁵

Given that the authorisation in Libya was to use all necessary means 'to protect civilians', whilst that in Côte d'Ivoire was more circumscribed in extending only to 'protect civilians under *imminent* threat of *physical* violence' (emphasis added), both lead to the clear interpretation that troops, whether those loyal to the two leaders or the opposition forces, on the verge of storming a civilian area could be targeted. Indeed, under the *jus ad bellum*

³² UNSCR 1975 (2011), paras. 1-4.

³³ A. Tzanakopoulos, 'The UN/French Use of Force in Abidjan: Uncertainties Regarding the Scope of UN Authorizations', *EJIL Talk!*, 9 April 2011, available at <http://www.ejiltalk.org/the-un-use-of-force-in-abidjan/>.

³⁴ Whilst these are not traditional armed conflicts as they are specifically mandated by the UNSC as opposed to taking place between two or more states (and are thus framed and restricted by the particular aims of this organ of the UN), the rules of the *jus in bello* nonetheless apply to the conduct of NATO forces operating in Libya and UNOCI/French forces operating in Côte d'Ivoire. See UN Secretary-General's Bulletin, *Observance by United Nations Forces of International Humanitarian Law*, UN Doc. ST/SGB/1999/13, 6 August 1999. See also C. Greenwood, 'Scope of Application of Humanitarian Law', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2nd edn, Oxford: Oxford University Press, 2008), §208, 51.

³⁵ S. Oeter, 'Methods and Means of Combat', in Fleck (ed.), *ibid.*, §441, 175.

the targeting of direct imminent threats of violence to civilians is clearly covered by both mandates and under the *jus in bello* the armed forces on the verge of committing such an act would be considered military objectives.³⁶

However, a closer reading of the mandates indicates scope for a broader interpretation of the possible targets. For example, in Libya the mandate was not provided simply ‘to protect civilians’ but also to protect ‘civilian populated *areas* under *threat* of attack’ (emphasis added) whilst in Côte d’Ivoire the mandate provided authorisation ‘to *prevent* the use of heavy weapons against the civilian population’ (emphasis added). As such, both appeared to permit the use of force in responding to more remote or indirect threats. Given this potential latitude in the respective mandates, it was not long before the authorised forces utilised them to justify strikes on more indirect threats, such as buildings and infrastructure of the two regimes,³⁷ with one such attack leading to the death of Colonel Gaddafi’s son.³⁸

Under the *jus in bello*, aside from the armed forces directly participating in the armed conflict, military objectives are defined in Additional Protocol I as being ‘limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.’³⁹ Consequently, the fatal demise of both leaders could lawfully occur on this basis as a collateral result of their being located in or within the proximity of a building, such as a command and control centre, which was targeted as a result of it being deemed key to preventing attacks on civilian populated areas in the case of Libya, or which contained a stockpile of heavy weapons in the case of Côte d’Ivoire. Of course, the lawfulness of any such strike is subject to the requirements of distinction and proportionality in considering the deaths of any civilians that would result from it.⁴⁰

However, whilst not expressly acknowledged there were allegations that the real intention of the strikes in the two states was the deaths of the two leaders which, of course, raises the question as to whether they could be *directly* targeted. At the time of writing, although Laurent Gbagbo’s arrest in an assault on his compound, which was claimed to be a store for heavy weapons,⁴¹ makes such a question moot in the context of Côte d’Ivoire, the direct targeting of Gaddafi in Libya is still very much a current question.⁴² Although

³⁶ Ibid., §442, 177.

³⁷ In connection with Libya see, for example, BBC News, ‘Libya: Missile Strike Destroys Gaddafi “Command Centre”’, 21 March 2011, available at <http://www.bbc.co.uk/news/world-africa-12801812>; BBC News, ‘Libya Crisis: NATO Strike Hits Gaddafi Compound’, 25 April 2011, available at <http://www.bbc.co.uk/news/world-africa-13184594>. In connection with Côte d’Ivoire see, for example, ‘Situation critique à Abidjan, Laurent Gbagbo se terre toujours’, *Le Monde*, 7 April 2011, available at http://www.lemonde.fr/afrique/article/2011/04/07/abidjan-la-france-frappe-des-objectifs-militaires-a-la-residence-de-gbagbo_1504070_3212.html#xtor=AL-32280270.

³⁸ BBC News, ‘NATO Strike “Kills Saif al-Arab Gaddafi”, Libya Says’, 1 May 2011, available at <http://www.bbc.co.uk/news/world-africa-13251570>.

³⁹ Article 52(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

⁴⁰ Articles 48 and 51(5)(b), Additional Protocol I, *ibid*.

⁴¹ BBC News, ‘Gbagbo Held After Assault on Residence’, 11 April 2011, available at <http://www.bbc.co.uk/news/world-africa-13039825>.

⁴² The UK Attorney-General’s advice on the deployment of UK forces and military assets was silent on the issue as to whether Gaddafi could be targeted to protect civilians. See *supra* n. 11.

NATO states have not shared a view on this,⁴³ on the basis of the resolution itself it is one that has been answered in the affirmative by several prominent international lawyers.⁴⁴

The lawfulness of targeting an individual depends upon their status. If Gaddafi is simply the ‘civilian leader’ of the state of Libya this status would in principle rule him out as a possible target.⁴⁵ Indeed, the only time when civilians can be targeted is if they ‘directly participate’ in hostilities with their actions having a direct causal effect.⁴⁶ This essentially means that if Gaddafi is of such a status he would need to be wielding a weapon with the possibility of directly harming civilians in one causal step before it becomes permissible to target him.

However, UNSCR 1970 (2011) states Gaddafi’s position as being the ‘Leader of the Revolution *and* Supreme Commander of Armed Forces’ with ‘responsibility for ordering repression of demonstrations, human rights abuses.’⁴⁷ As such, it is clear that he is not simply a civilian with the connected protection against targeting that this provides. Indeed, for the purposes of the principle of distinction and the law relating to targeting in an international armed conflict such status is specifically provided to those who are not ‘members of the armed forces’.⁴⁸ Although Gaddafi is not a gun-wielding combatant the *jus in bello* does not require members of the armed forces to be specifically carrying a weapon before becoming a legitimate target. Indeed, even if he was designated as a ‘non-combatant’ within the armed forces of Libya and without a combat function he would still in principle constitute a legitimate military target at all times.⁴⁹

However, whilst in the course of a traditional armed conflict between two or more states the defeat of the armed forces of the enemy is normally seen as a constant military objective this is not the case here where the actions of the NATO forces are specifically framed and limited to the objectives and purposes of the UN operation in question. As such, they are only permitted in doing what is necessary to protect civilians. In this sense, it is only if it can be demonstrated that ‘civilian populated areas’ are under a constant threat of attack as a result of Gaddafi’s policies and orders that it would be arguably

⁴³ Ambiguity in the mandate on this point led to debate not just between the coalition members but also between individuals within the coalition states themselves. In the UK, for example, the Defence Secretary, Dr Liam Fox, and the Foreign Secretary, William Hague, were clear early on that this was something that was not to be ruled out, whilst the Prime Minister, David Cameron, and the Chief of Defence Staff, General Sir David Richards, stated that the targeting of Gaddafi was not permitted under the mandate. See BBC News, ‘Libya: Removing Gaddafi Not Allowed, says David Cameron’, 21 March 2011, available at <http://www.bbc.co.uk/news/uk-politics-12802749>.

⁴⁴ Akande, *supra* n. 31. Various other international lawyers, such as Philippe Sands, Malcolm Shaw, and Ryszard Piotrowicz, appear to share this view. See P. Wintour and O. Bowcott, Libya: The Legal Case for Deployment, *The Guardian*, 21 March 2011, available at <http://www.guardian.co.uk/world/2011/mar/21/libya-arab-and-middle-east-protests>.

⁴⁵ Article 51, Additional Protocol I, *supra* n. 39.

⁴⁶ ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, (Geneva 2009), available at <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>, 52. Indeed, the *Interpretive Guidance* is narrow in speaking not of participation in an armed conflict, but of participation in *hostilities*.

⁴⁷ UNSCR 1970 (2011), Annex I (emphasis added).

⁴⁸ Article 50(1), Additional Protocol I, *supra* n. 39 and ICRC, *Interpretive Guidance*, *supra* n. 46, 20.

⁴⁹ K. Ipsen, ‘Combatants and Non-Combatants’, in Fleck (ed.), *supra* n. 34, §314, 99; D. Akande, ‘Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities’ (2010) 59 *International and Comparative Law Quarterly* 180, 186.

necessary to make him a specific target.⁵⁰ Given the charges against Gaddafi, this would arguably not be difficult to do.

B. Forcibly imposed exile

A forcibly imposed exile is perhaps the ‘ultimate’ intervention in international law but, whilst it remains unlawful through unilateral means, it is one that in theory could be authorised by the UNSC.⁵¹ Indeed, if we take the authorisation to use ‘all necessary means’ to its logical conclusion such a measure could theoretically be necessary for the protection of civilians. Furthermore, even if this was not originally expressed as part of the mandate by the member states of the UNSC upon the adoption of the resolutions, if a consensus emerged between the UNSC members that a regime had a long-term and sustained policy in place which endangered the lives of civilians, it is perhaps reasonable to perceive its removal as a necessary and proportionate measure to secure the aims of the mandate.

Although in Côte d’Ivoire such a policy was not necessarily held by Laurent Gbagbo, it was also clear that the civil strife being witnessed in the state would not cease until the election issue had been resolved, which ultimately meant Gbagbo stepping down or being removed from power. Consequently, whilst Gbagbo was not forcibly exiled, if the accounts are accurate that UNOCI and French attack helicopters targeted the heavy weapons being used by Gbagbo’s forces whilst forces loyal to Alassane Ouattara launched the ‘final assault’ on Gbagbo’s compound which led to his arrest,⁵² then the UNOCI/French forces do not appear to have acted outside of their UNSC mandate in the events which ultimately facilitated a regime change. They were mandated ‘to prevent the use of heavy weapons’ so were not, strictly speaking, overstepping their mandate to remain impartial.⁵³

However, in an attempt to clarify the extent of their mandate in Libya, on 14 April 2011 President Barack Obama of the US, Prime Minister David Cameron of the UK and President Nicolas Sarkozy of France published a joint letter in several newspapers in which they declared that ‘[o]ur duty and our mandate under UN Security Council Resolution 1973 is to protect civilians, and we are doing that. *It is not to remove Gaddafi*

⁵⁰ As Phillippe Sands noted, ‘The authorisation of “all necessary measures” is broad and appears to allow the targeting of Gaddafi and others who act to put civilians “under threat of attack”, words that go beyond the need to establish a connection with actual attacks.’ P. Sands, ‘UN’s Libya Resolution is Better Late Than Never’, *The Guardian*, 18 March 2011, available at <http://www.guardian.co.uk/law/2011/mar/18/libya-un-resolution-1973>.

⁵¹ Whilst Article 2(7) of the UN Charter (1945) prohibits the intervention of the UN in the domestic affairs of states, this is not applicable to ‘enforcement measures’ adopted under Chapter VII of the Charter. Resolutions authorising the use of ‘all necessary means’ are normally adopted under Chapter VII thereby permitting the UNSC to intervene in such situations if it determines that there is a ‘threat to the peace, breach of the peace or act of aggression’ under Article 39.

⁵² See BBC News, ‘Gbagbo Held After Assault on Residence’, 11 April 2011, available at <http://www.bbc.co.uk/news/world-africa-13039825>. See also BBC News, ‘Did UN Forces Takes Sides in Ivory Coast?’, 7 April 2011, available at <http://www.bbc.co.uk/news/world-africa-13004462>.

⁵³ The Russian Foreign Minister, Sergei Lavrov, did question, however, the legality of the air strikes by UNOCI and France. See BBC News, ‘Did UN Forces Takes Sides in Ivory Coast?’, *ibid*.

by force' (emphasis added).⁵⁴ Conversely, and perhaps bolstered by the international 'contact group' calling for Gaddafi to step down,⁵⁵ the letter then went on to state that 'it is impossible to imagine a future for Libya with Gaddafi in power' so that as 'long as Gaddafi is in power, Nato and its coalition partners must maintain their operations so that civilians remain protected and the pressure on the regime builds.'⁵⁶ The aims of these coalition members are thus contradictory. Whilst it is acknowledged that they are not mandated to remove Gaddafi by force, it is clearly intended that the pressure on the regime through military means would be maintained until he is no longer in power. However, the letter was phrased in such a way as to imply that the protection of civilians and pressure on the regime were different aims.

Although the phrase 'regime change' was too controversial to be included, this was clearly the implication, which met with defiance from Colonel Gaddafi.⁵⁷ As with *Operation Iraqi Freedom* in 2003, the message that these members of NATO appear to be conveying is that regime change is the only method of achieving the goal of compliance with UNSCRs as opposed to being the goal itself.⁵⁸ Indeed, it is clear that the UK does not view regime change as a lawful basis for the use of force under international law.⁵⁹

Interestingly, whilst *Operation Iraqi Freedom* was a direct forcible action with the clear aim of removing Saddam Hussein so as to enforce compliance with the UNSCRs, the direct bombing by NATO forces, justified on the basis of the protection of civilians, seems more of a background offensive with the real aim of regime change being effected by more indirect means in the form of support for the opposition forces.⁶⁰ It is notable that in Iraq such indirect means of regime change were not thought wise due to the risk that it may result in replacing Saddam Hussein with another 'Sunni military strongman'.⁶¹

⁵⁴ B. Obama, D. Cameron, and N. Sarkozy, 'Libya's Pathway to Peace', *New York Times*, 14 April 2011, available at <http://www.nytimes.com/2011/04/15/opinion/15iht-edlibya15.html>.

⁵⁵ BBC News, 'Libya: Gaddafi Must Step Down, Says "Contact Group"', 14 April 2011, available at <http://www.bbc.co.uk/news/world-africa-13058694>. The Contact Group on Libya was announced by UK Foreign Secretary William Hague after the London Conference on Libya on 29 March 2011 and includes European powers, the US, allies from the Middle East and a number of international organisations. The aims of the Contact Group are to provide leadership and overall political direction to the international effort in Libya in close coordination with the UN, AU, Arab League, OIC, and EU; provide a forum for coordinating the international response on Libya; and provide a focal point in the international community for contact with the Libyan parties. See <http://www.fco.gov.uk/en/news/latest-news/?view=News&id=575592482>.

⁵⁶ Supra n. 54.

⁵⁷ BBC News, 'Gaddafi Says He Won't be Forced From His Country', 30 April 2011, available at <http://www.bbc.co.uk/news/world-africa-13246540>. The African Union attempted to broker a ceasefire between Colonel Gaddafi and the opposition group, the Transitional National Council. Whilst this was accepted by Gaddafi it was rejected by the Transitional National Council as it did not provide plans for Gaddafi to step down. See BBC News, 'Libya: Benghazi Rebels Reject African Union Truce Plan', 11 April 2011, available at <http://www.bbc.co.uk/news/world-africa-13249923>. A subsequent effort to negotiate an 'exit strategy' for Gaddafi by South African President Jacob Zuma also failed. See Aljazeera, 'Zuma to Offer Gaddafi "Exit Strategy"', 25 May 2011, available at <http://english.aljazeera.net/news/africa/2011/05/20115259220999993.html>.

⁵⁸ See Weller, supra n. 1, 200.

⁵⁹ In a detailed 'Options Paper' for UK policy on Iraq, produced by the Overseas and Defence Secretariat of the Cabinet Office on 8 March 2002, it was clearly stated that 'regime change has no basis in international law'. See Overseas and Defence Secretariat, Cabinet Office, 8 March 2002, Summary Page, para. 28, available at <http://downingstreetmemo.com/>.

⁶⁰ See Section II above.

⁶¹ 'Options Paper', supra n. 59, para. 11. See also Weller, supra n. 1, 197.

However, in Libya, despite some acknowledgment that it is not fully known who the opposition forces are that they are supporting to fill the power vacuum that would be created by regime change,⁶² these means now appear acceptable.

IV. CONCLUSION

The positive aspect of these interventions, one might say, was the general insistence on the involvement of the UNSC. Unilateral action was debated but ultimately avoided no doubt in part to avoid the allegations of illegality that surrounded the campaign in Kosovo.⁶³ Indeed, NATO and most of its member states stressed that a clear legal basis was necessary for forcible action in Libya and that this should be in the form of an authorisation from the UNSC.⁶⁴ Consequently, in many respects, the UNSC's role and authority in the maintenance of 'international' peace and security has been reaffirmed. This reaffirmation was significant, and much needed, after the damage to the authority of the UNSC in the aftermath of *Operation Iraqi Freedom* in 2003. However, the problem of ambiguity, intentional or otherwise, in the mandates of Chapter VII resolutions of the UNSC, along with the possibilities for unilateral and potentially controversial interpretations that this provides, is one that still persists. With the UK and its NATO allies now conceding that Gaddafi will not be forcibly exiled through air power alone,⁶⁵ the possible limits of such interpretations look set to be tested further.

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⁶² See supra n. 30.

⁶³ See, generally, B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects' (1999) 10 *European Journal of International Law* 1; C. Gray, 'The Legality of NATO's Military Action in Kosovo: Is There a Right of Humanitarian Intervention' in W. Tieva and S. Yee (eds), *International Law in the Post-Cold War World* (London: Routledge, 2000), 240.

⁶⁴ BBC News, 'Libya: UK and French No-Fly Zone Plan Gathers Pace', 8 March 2011, available at <http://www.bbc.co.uk/news/world-africa-12672640>.

⁶⁵ R. Norton Taylor and C. Stephen, 'British Concede Bombing Alone Will Not Budge Gaddafi', *The Guardian*, 15 June 2011, 1.

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